



FILED
Mar 03 2008, 8:46 am
Kevin L. Smith
CLERK
of the supreme court,
court of appeals and
tax court

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Mary Beth Bonaventura, Senior Judge
Cause No. 45D06-0707-JT-4
45D06-0707-JT-5

March 3, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Delores W. (“Mother”) appeals the involuntary termination of her parental rights, in Lake Superior Court, Juvenile Division, to her children R.W. and M.W. On appeal, Mother claims she was denied her constitutional right to due process when the termination hearing was held in her absence and without the benefit of counsel. Mother further asserts that the juvenile court’s judgment terminating her parental rights to her children was not supported by clear and convincing evidence. Concluding that Mother’s constitutional right to due process was not violated and that the juvenile court’s judgment was supported by clear and convincing evidence, we affirm.

Facts and Procedural History

The facts most favorable to the judgment reveal that on or about July 7, 2005, seven-year-old M.W. told a neighbor that she had been sexually abused by her mother’s boyfriend. The Lake County Department of Child Services (“LCDCS”) was notified of the allegation by police and initiated an investigation. During the investigation, it was discovered that Mother’s boyfriend was having sex with M.W. and that Mother had been made aware of the abuse, but failed to take any sort of action to prevent the reoccurrence of the molestation. The LCDCS caseworker also observed that the conditions of the family home were filthy, the children were bed-wetting, and it was reported that M.W. was acting out sexually with other

children in the neighborhood. As a result of the investigation, M.W. and her eight-year-old brother, R.W., were temporarily removed from the care and custody of Mother on July 7, 2005.

On July 12, 2005, a detention hearing was held and the juvenile court ordered that the children be made temporary wards of the State of Indiana. The juvenile court ordered immediate services for reunification of the family, including a physical exam, psychological evaluation and any resulting recommended treatment for M.W., family counseling and therapy for Mother and the children, and parenting classes and home-based services for Mother. From July 2005 until October 2005, Mother failed to participate in any court-ordered services. In October 2005, Mother became incarcerated on neglect charges relating to the underlying facts of this case. Services were therefore discontinued.

On October 17, 2005, a hearing on the CHINS petition was held. Mother was not present at the hearing. The juvenile court granted the LCDCS's petition, making M.W. and R.W. wards of the LCDCS, retroactive to July 7, 2005.

On January 10, 2007, the LCDCS filed a petition to involuntarily terminate Mother's parental rights to M.W. and R.W.¹ The initial hearing and fact-finding hearing on the termination petition were held on the same day, April 5, 2007. The juvenile court subsequently issued its judgment terminating Mother's and both of the fathers' parental rights. In so doing, the trial court made the following pertinent findings:

The Court has entered a finding under I.C. 31-34-21-5.6, that reasonable efforts for family preservation or reunification are not required

¹ The termination petition also sought to terminate the parental rights of the children's fathers, Robert H. and Leroy W. Neither father participated in the proceedings below, and neither father is a party to this appeal.

* * *

There is a reasonable probability that the conditions resulting in the removal of the child from their parents' home will not be remedied in that: the children were removed from their mother's care on 7/7/05 and were placed in foster care, and have never been returned to parents since their removal.

Mother, before she became incarcerated for criminal acts that led to this petition, did not avail herself [of] any of the services that were provided, which would have been between July of '05 and October of '05. [LCDCS] became involved with the family, because the mother failed to take appropriate action to protect [M.W.], after she was informed by [M.W.] that she had been sexually molested several times by mother's boyfriend. Mother was charged with numerous felony charges, as a result of her failure to adequately protect her child. Mother is currently serving a 10 year prison term, as it relates to the child molesting charges in this case. Neither father has ever come forward to avail themselves of services that were ordered by the Court. The whereabouts of the fathers are unknown. When relatives of the mother visited the children, the children were told that it was their fault that the mother was in prison.

There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child in that: For the same reasons stated above.

Appellant's Br. at ii. The following appeal ensued.

Discussion and Decision

I. Due Process

Mother first asserts that she was denied her constitutional right to due process. Contrary to the requirements of Indiana Appellate Rule 46A(8)(a), Mother makes no cogent argument or citation to authority to support her argument that her constitutional rights were "trampled on[,]” other than to summarily assert that she was denied due process because she was never appointed an attorney to represent her in the CHINS or termination proceedings and because the juvenile court “never issued an Order to Transport [Mother] from the Lake County Jail, even though she was served there.” Appellant's Br. at 4. We will nevertheless

address the merits of Mother's argument.

The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. In re E.E., 853 N.E.2d 1037, 1043 (Ind. Ct. App. 2006), trans. denied. It is well settled that the right to raise one's own children is an "essential, basic right that is more precious than property rights." In re C.C., 788 N.E.2d 847, 852 (Ind. Ct. App. 2003), trans. denied. Thus, when a state seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of the due process clause. Lawson v. Marion County Office of Family & Children, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005). However, the "right to appointment of counsel as a due process protection is not absolute." In re M.M., 733 N.E.2d 6, 9 (Ind. Ct. App. 2000); see also Baker v. Marion County Office of Family & Children, 810 N.E.2d 1035, 1038 (Ind. 2004) (stating that the U.S. Constitution does not require the appointment of counsel in every parental termination proceeding). Likewise, a parent does not have a constitutional right to be physically present at a final termination hearing. C.C., 788 N.E.2d at 853.

Although a juvenile court has discretion to appoint counsel for a parent in any juvenile proceeding, "no statute provides a parent the right to court appointed counsel in CHINS proceedings." In re R.R., 587 N.E.2d 1341, 1345 (Ind. Ct. App. 1992). The right to counsel in proceedings to *terminate* parental rights, however, is granted by statute. See Ind. Code § 31-32-2-5. In order to protect this right, the juvenile court must inform the parents in involuntary termination proceedings both of their right to be represented by counsel and their right to appointed counsel if they are indigent. In re A.N.J., 690 N.E.2d 716, 720 (Ind. Ct.

App. 1997). Failure to appoint counsel in a termination proceeding will be reviewed only for an abuse of discretion. In re Johnson, 415 N.E.2d 108, 111 (Ind. Ct. App. 1981).

A review of the record reveals that Mother was notified of the termination hearing on several occasions. Mother was initially served via publication in the *Crown Point Star*, a local newspaper, on January 25, February 1, and February 8, 2007. Mother was also served with notice of the termination hearing at the Lake County Jail on January 18 and January 22, 2007.²

Despite having received notice of the termination hearing, there is nothing in the record to suggest that Mother ever took any steps to secure her attendance at the termination hearing, either in person or telephonically. Nor did Mother request a continuance. Also, nowhere does there appear to be a request for counsel due to Mother's economic status. Absent such a request, and evidence in support thereof, we conclude that the trial court did not abuse its discretion in failing to appoint counsel and in proceeding with the termination hearing without securing Mother's presence. See A.N.J., 690 N.E.2d at 720 (concluding that because father failed to appear, the trial court was not obligated to inform him of his statutory right to be represented by counsel and did not err in failing to appoint counsel for father); In re C.B., 616 N.E.2d 763, 770 n.4 (Ind. Ct. App. 1993) (stating that the right to be present at any hearing concerning the child is waived by that person's failure to appear after lawful notice); see also In re S.P.H., 806 N.E.2d 874, 879 (Ind. Ct. App. 2004) (determining that the trial court did not violate father's rights to due process when the court failed to secure his presence during the CHINS hearings where the record indicates that the father never filed a

motion to transport for the CHINS hearings).

II. Clear and Convincing Evidence

Mother next challenges the sufficiency of the evidence supporting the termination of her parental rights to R.W. and M.W.

Standard of Review

This court has long held a highly deferential standard of review in cases concerning the termination of parental rights. In re K.S., 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). Thus, when reviewing the termination of parental rights, we neither reweigh the evidence nor judge the credibility of the witnesses. In re Kay L., 867 N.E.2d 236, 239 (Ind. Ct. App. 2007). Instead, we consider only the evidence that supports the trial court's decision and the reasonable inferences drawn therefrom. Id.

Here, the juvenile court made specific findings in its order terminating Mother's parental rights. Where the juvenile court enters specific findings and conclusions thereon, we apply a two-tiered standard of review. Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second we determine whether the findings support the judgment. Id. In deference to the juvenile court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), trans. denied, cert. denied, 534 U.S. 1161 (2002). Thus, if the evidence and inferences support the juvenile court's decision, we must affirm. Id.

² Mother admits to having been served with notice of the termination hearing in her brief to this court

The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. Bester, 839 N.E.2d at 147. A parent's interest in the care, custody, and control of his or her children is perhaps the oldest of our fundamental liberty interests. Id. However, these parental interests are not absolute and must be subordinated to the child's interests when determining the proper disposition of a petition to terminate parental rights. In re M.B., 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), trans. denied. Parental rights may therefore be terminated when the parents are unable or unwilling to meet their parental responsibilities. K.S., 750 N.E.2d at 836.

In order to terminate a parent-child relationship, the State is required to allege and prove that:

- (A) [o]ne (1) of the following exists:
 - (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;

* * *
- (B) there is a reasonable probability that:
 - (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
 - (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
- (C) termination is in the best interests of the child; and
- (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b). The State must establish each of these allegations by clear and convincing evidence. Egly v. Blackford County Dep't of Pub. Welfare, 592 N.E.2d 1232, 1234 (Ind. 1992).

Mother does not challenge the juvenile court's determination that the children had

as well. See Appellant's Br. at 4.

been removed for more than six months under a dispositional decree or that the LCDCS had a satisfactory plan for the children's care and treatment: namely, adoption. Mother does assert, however, that the LCDCS failed to prove by clear and convincing evidence that (A) the conditions which led to the children's removal and continued placement of the children outside the family home would likely not be remedied, and (B) that the continuation of Mother's parental relationship with the children posed a threat to the children's well being.

A. Conditions Will Not Be Remedied

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the trial court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. In re J.T., 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), trans. denied. However, the court must also "evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." Id. Pursuant to this rule, courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment. A.F. v. Marion County Office of Family & Children, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), trans. denied. The trial court may also properly consider the services offered by the office of family and children to a parent, and the parent's response to those services as evidence of whether conditions will be remedied. Id. Additionally, the LCDCS was not required to rule out all possibilities of change; rather, it need establish only that there is a reasonable probability that Mother's behavior will not change. Kay L., 867 N.E.2d at 242.

In ordering that Mother's parental rights to R.W. and M.W. be terminated, the juvenile court found that the LCDCS became involved with the family because Mother had failed to take appropriate action to protect M.W. from being repeatedly molested by Mother's boyfriend, despite Mother's knowledge of the molestations. The court also found that Mother failed to avail herself of the court-ordered services that were provided to her during the three months leading up to her incarceration. The evidence, which indicates that Mother failed to participate in parenting classes, failed to participate in individual and family counseling, and failed to participate in or complete home-based services before being incarcerated supports the juvenile court's findings. There is also no evidence in the record that Mother ever attempted to address her parenting deficiencies by participating in any programs while incarcerated. Additionally, at the time of the termination hearing, Mother remained incarcerated, serving a ten-year prison term for felony neglect convictions stemming from the allegations in the underlying cause.

“[A] pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change.” Lang v. Starke County Office of Family & Children, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), trans. denied. Based on the foregoing, we conclude that the LCDCS presented clear and convincing evidence that there was a reasonable probability that the conditions leading to the children's removal from Mother's care and custody would not be remedied.

A juvenile court need not wait until the children are “irreversibly influenced” such that their physical, mental, and social growth is permanently impaired before terminating the

parent-child relationship. A.F., 762 N.E.2d at 1253. Under the facts of this case, it is unfair to ask the children to continue to wait until Mother is willing and able to get, and benefit from, the help that she needs. The approximately two years that have already passed is long enough. See S.P.H., 806 N.E.2d at 883 (concluding that the needs of a child are too substantial to force the child to wait and see if an incarcerated parent, once released, would be able to care for and gain custody of the child); In re Campbell, 534 N.E.2d 273, 275 (Ind. Ct. App. 1989) (stating that the court was unwilling to put the children “on a shelf” until their mother was capable of caring for them.).

B. Best Interests

Lastly, we address Mother’s contention that the LCDCS failed to prove by clear and convincing evidence that termination of her parental rights was in the children’s best interests.

We are mindful that in determining what is in the best interests of the children, this court is required to look beyond the factors identified by the Office of Family and Children, and look to the totality of the evidence. McBride v. Monroe County Office Of Family & Children, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). We further acknowledge that the purpose of terminating parental rights is not to punish the parents, but to protect the children involved. K.S., 750 N.E.2d at 836. However, in determining the best interests of the children, the juvenile court must subordinate the interests of the parents to those of the children. McBride, 798 N.E.2d at 203.

Mother is correct in her assertion that the right of parents to raise their children should not be terminated solely because there is a better home available for the children. See K.S.,

750 N.E.2d at 837. Our review of the evidence, however, does not reveal that the juvenile court's termination of Mother's parental rights was based on who could provide a "better" home for the children, but instead was properly based on the inadequacy of Mother's care and custody. See In re V.A., 632 N.E.2d 752, 756 (Ind. Ct. App. 1994) (stating that it is the inadequacy of parental custody, not the superiority of an available alternative, that determines whether parental rights should be terminated).

In addition to being incarcerated at the time of the termination hearing, the evidence most favorable to the judgment reveals that the children had developed a strong and positive relationship with their foster mother, who planned to adopt them. Additionally, at trial, LCDCS case manager Gloria Person testified that the children were "very bonded" with their foster mother, that the children "look to her for support[.]" and that "it's just an excellent relationship for these children." Transcript at 13. Person further testified that she felt termination was in the children's best interests because Mother was incarcerated, and because the children need a "nurturing" and "safe home[.]" and that the children "absolutely feel safe at [their foster home]" Id. at 14. This evidence, coupled with the evidence that the conditions resulting in placement outside the home will not be remedied is sufficient to prove by clear and convincing evidence that termination of the parent-child relationship is in the children's best interests. See M.M., 733 N.E.2d at 13 (stating that testimony from the family case manager and court-appointed special advocate that termination of the parent-child relationship was in the child's best interest, coupled with evidence that the conditions that resulted in the child's removal will not be remedied, was sufficient to show that termination was in the child's best interests).

Conclusion

In sum, we conclude that Mother's constitutional right to due process was not violated and that the juvenile court did not abuse its discretion in failing to appoint counsel to Mother and proceeding with the termination hearing where Mother received proper notice of the hearing but failed to appear. Additionally, the LCDCS proved by clear and convincing evidence that (A) the conditions resulting in the children's removal and continued placement outside of Mother's care will not be remedied, and that (B) termination of Mother's parental rights is in the children's best interests. The juvenile court's order terminating Mother's parental rights to R.W. and M.W. is therefore affirmed.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.